2001

Terri Ann Peatross aka Terri Ann Delic dba Heidi's Massage v. Salt Lake County Board of County Commissioners : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

--oo0oo--

TERRI ANN PEATROSS aka TERRI ANN DELIC dba HEIDI'S MASSAGE,

Plaintiff and Appellant,

vs.

SALT LAKE COUNTY BOARD OF COUNTY COMMISSIONERS; WILLIAM E. DUNN, RALPH Y. McCLURE, and PETE KUTULAS as Commissioners, and DELMAR LARSON, Salt Lake County Sheriff,

Defendants and Respondents:

Case Nos. 14325 and 14265

BRIEF OF RESPONDENT

An Appeal From the Judgment Entered in the Third Judicial District Court, In and for Salt Lake County, The Honorable Bryant H. Croft, Judge, Presiding

---

D. KENDALL PERKINS
716 Newhouse Building
Salt Lake City, Utah 84111
Attorney for Plaintiff-Appellant

R. PAUL VAN DAM
Salt Lake County Attorney
Metropolitan Hall of Justice
Salt Lake City, Utah 84111

DONALD SAWAYA
Chief Civil Deputy County Attorney
Metropolitan Hall of Justice
Salt Lake City, Utah 84111

MARCUS G. THEODORE
Deputy County Attorney
Metropolitan Hall of Justice
Salt Lake City, Utah 84111
Attorneys for Defendants-Respondents

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

AUTHORITIES CITED

CASES

TABLE OF CONTENTS
(continued)

CONSTITUTION

COUNTY ORDINANCES

Revised Ordinances of Salt Lake County, 1966, as amended

STATUTES

Utah Code Annotated, 1953, as amended

RULES

IN THE SUPREME COURT OF THE STATE OF UTAH

TERRI ANN PEATROSS aka TERRI ANN DELIC, dba HEIDI'S MASSAGE,

Plaintiff and Appellant,

vs.

SALT LAKE COUNTY BOARD OF COUNTY COMMISSIONERS, WILLIAM E. DUNN, RALPH Y. McCLURE, and PETE KUTULAS, as Commissioners and DELMAR LARSON, Salt Lake County Sheriff,

Defendants and Respondents

Case Nos. 14325 and 14265

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Plaintiff-appellant initiated this action in the lower court to obtain a de novo review of the revocation by the Board of County Commissioners of Salt Lake County of her business license to operate a massage parlor in Salt Lake County; also to challenge the constitutionality of Sections 15-18-6, 10, and 11 of the Revised Ordinances of Salt Lake County, 1966, as amended.

DISPOSITION IN THE LOWER COURT

After a license revocation hearing was held on April 10, 1975, wherein the Board of County Commissioners voted to revoke plaintiff-appellant's license for allowing an employee to offer sex acts for hire, she petitioned the lower court in Case No. 14265, for a de novo trial regarding the revocation of her license. The lower court in its first hearing, treated plaintiff-appellant's

complaint as an extraordinary writ, and ruled that her license was improperly revoked, after one Board member, who was not present at the hearing, and after reading the record, voted to revoke, plaintiff-appellant's license. Plaintiff-appellant then appealed to this Honorable Court, the lower court's treatment of her complaint as an extraordinary writ of review.

A second license revocation hearing was then held on September 22, 1975, before all three of the County Commissioners to reconsider the previous grounds for revocation, plus two additional grounds. A majority of the Board voted in favor of revocation of plaintiff-appellant's license, and she then petitioned the lower court, in Case No. 230771 for a de novo trial regarding the second revocation of her license. The lower court dismissed plaintiff-appellant's petition for a de novo review of her business license, and granted her 10 days to file an extraordinary writ. Plaintiff-appellant then elected to appeal the denial of her complaint which sought a de novo trial, rather than filing an extraordinary writ.

On November 17, 1975, this Court consolidated both appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff-appellant seeks reversal of the lower court's dismissal of her complaint in Case No. 230771, wherein she sought a de novo trial, regarding the revocation of her business license by the Board of County Commissioners of Salt Lake County, and a remand to the lower court for a ruling as to the constitutionality of Section 15-18-6, 10, and 11 of the Revised Ordinances of Salt Lake County, 1966, as amended.

STATEMENT OF FACTS

On April 10, 1975, a two man quorum of the Board of County Commissioners of Salt Lake County met to consider the suspension, or revocation, of the business license of Ms. Terri Anne Peatross dba Heidi's Massage (Minutes R. 69). After one of plaintiff-appellant's employees, Susan Anderson, testified at the hearing that she performed "locals", while nude, for customers while employed by plaintiff-appellant (Minutes R. 69-70); plaintiff-appellant testified that she was aware of the provisions of Sections 15-18-6 and 10 of the Revised Ordinances of Salt Lake County, 1966, as amended, prohibiting this type of activity and had instructed her employees not to perform these acts (Minutes R. 70). When asked by Commissioner McClure whether she had a system of checks to insure that the ordinance provisions were complied with, plaintiff-appellant testified that she made inspections, but wasn't there all of the time, so that the girls were pretty much on their own (Minutes R. 70). The matter was then taken under advisement by the Commission (Minutes TR. 71).

On April 15, 1975, at a regular meeting before the entire Board of County Commissioners of Salt Lake, a vote was taken regarding revocation of plaintiff-appellant's business license. At this meeting, Commissioner Dunn abstained from voting since he was not present at the April 10, 1975 hearing; the other two Commissioners split their votes, one voting to revoke, the other voting not to revoke, (Minutes R. 73). Commissioner Dunn then asked to read the record of the hearing and agreed to also vote on the matter.

After reading the minutes of the April 10, 1975 license revocation hearing, Commissioner Dunn, on April 24, 1975, voted to revoke the plaintiff-appellant's license (Minutes R. 72).

On June 18, 1975, Findings of Fact and an Order revoking plaintiff-appellant's business license were signed by the Board of County Commissioners (Findings of Fact and Order R. 74).

On July 7, 1975, plaintiff-appellant filed, and subsequently amended, a verified complaint and a notice of appeal, seeking a de novo trial regarding the revocation of her massage parlor license. Defendants-respondents then moved to dismiss plaintiff-appellant's amended complaint on the grounds that she was not entitled to a de novo hearing regarding the revocation of her license (R. 26). On July 31, 1975, in a memorandum decision, the Honorable Bryant H. Croft ruled that the plaintiff-appellant was not entitled to a de novo hearing, and that he was treating plaintiff-appellant's amended complaint as an extraordinary writ. He set aside the revocation because of irregularities in the voting procedures engaged in by the Board of County Commissioners of Salt Lake County (Memorandum Decision, R. 56).

Plaintiff-appellant then filed an appeal from the subsequent order denying her application for a trial de novo. (Notice of Appeal, R. 114). The entire County Commission then proceeded to rehear the original complaint plus two new and independent grounds for revocation, after plaintiff-appellant's motion to stay the rehearing was denied (Order, R. 115).

On September 22, 1975, a second hearing before the three County Commissioners was held to consider the suspension, or revo-

cation, of plaintiff-appellant's business license on the grounds that: 1) Susan Anderson, an employee of plaintiff-appellant, agreed on February 19, 1975, to massage for hire, while nude, the genital area of a Salt Lake County Sheriff's undercover officer, contrary to Section 15-18-6 of the Revised Ordinances of Salt Lake County, 1966, as amended; 2) that on or about July 17, 1975, another employee, Susan Langston, worked as a masseuse at Heidi's Massage Parlor, without having obtained a masseuse license, contrary to Section 15-18-2 and 10 of the Revised Ordinances of Salt Lake County, 1966, as amended; and 3) Kim Le Coure, another employee of plaintiff-appellant, agreed, on July 17, 1975, to massage for hire, while nude, the genital area of a Salt Lake County Sheriff's undercover agent, contrary to Section 15-18-6 of the Revised Ordinances of Malt Lake County, 1966, as amended (Notice of Hearing, R. 29).

Section 15-18-2 of the Revised Ordinances of Salt Lake County, 1966, as amended, reads as follows:

> "Sec. 15-18-2. License Required. It shall be unlawful for any person to operate, conduct, carry on or maintain a massage parlor or engage in the business of a masseur in Salt Lake County without first obtaining a license to do so."

Section 15-18-6 of the Revised Ordinances of Salt Lake County, 1966, as amended, reads as follows:

> "Sec. 15-18-6. Unlawful Conduct. Masseurs, masseuses, massage parlor licensees or their employees shall not perform the following acts or offer or agree to perform the following acts on any customer, patron or other person receiving or desiring to receive their services:
>
> (1) Sexual acts prohibited by Part 13, Chapter 10, Title 76, Utah Code Annotated, 1953, as amended.
>
> (2) The removal of clothing by a masseur or

masseuse so as to display the female breast or breasts, or genital area of either sex, or the wearing of clothing that intentionally reveals the same.

(3) Any touching of the genital area.

(4) Allowing the customer to massage, touch or fondle the masseur or masseuse.

(5) No massage shall be given in a locked room or enclosure."

Section 15-18-10 of the Revised Ordinances of Salt Lake County, 1966, as amended, reads:

"Sec. 15-18-10. Revocation or Suspension of License. Any unlawful conduct, whether the omission to perform an act required by this ordinance, or any act prohibited by this ordinance shall be cause for revocation or suspension of a massage parlor licensee's or masseur's license. The holder of a massage parlor license shall have his license revoked or suspended for any and all acts or omissions of his employees, which are either prohibited or required by any provision of this ordinance.

Any license granted under this title may be suspended or revoked by the County Commission for cause as set forth in this title. A minimum of five days notice shall be given to the licensee advising him of the date and time for hearing and listing the cause or causes for such suspension or revocation. If such cause also constitutes a criminal act in violation of the Revised Ordinances of Salt take County or in violation of the laws of the State of Utah, such hearing will be heard independently of such criminal charge and shall not be dependent in any way upon the filing of or conviction of such charge or charges.

Section 15-18-11 of the Revised Ordinances of Salt Lake County, 1966, as amended, reads:

"Sec. 15-18-11. Penalties. In addition to the revocation or suspension of licenses outlined above, a person convicted of any violation of this ordinance shall be fined not to exceed $299.00, or imprisonment in the Salt lake County Jail not to exceed six months, or both."

At the hearing, Deputy Richard Sourez testified that Susan Anderson agreed to take off her clothes and massage his genitals for $20.00 (Minutes, R. 19). Also presented in evidence was a certificate from Justice of the Peace, Charles A. Jones wherein he certified that, 1) Susan Langston pleaded guilty to a charge of working without a masseuse license on July 17, 1975, in Docket #468-093A; and 2) Kim Le Coure, aka "Tammy", while working for plaintiff-appellant, pleaded guilty to unlawful conduct prohibited under Section 15-18-6 of the Revised Ordinances of Salt lake County, 1966, as amended, for her arrest on July 17, 1975, for offering to massage for $15.00, while nude, the genital area of Deputy Sourez (Minutes, R. 20 & 28).

After the hearing of September 22, 1975, Commissioners Dunn and McClure voted to revoke plaintiff-appellant's license; Commissioner Kutulas voted not to revoke her license (Minutes, R. 24). The license was ordered revoked.

On October 1, 1975, Findings of Fact and an Order revoking plaintiff-appellant's business license were then signed by the Board of County Commissioners (Findings of Fact, R. 33).

On October 2, 1975, plaintiff-appellant filed a verified complaint and notice of appeal, seeking a de novo trial regarding the revocation of her license. Defendants-respondents then moved to dismiss plaintiff-appellant's complaint on the grounds that she was not entitled to a de novo hearing of the revocation of her license (R. 18). On October 22, 1975, the defendants-respondents' motion to dismiss was granted, on the grounds that plaintiff-appellant's first and second causes of action seeking a de novo trial were not proper, inasmuch as plaintiff-appellant was only entitled

to a judicial review of the record of the prior license revocation hearing, pursuant to Rule 65B of the Utah Rules of Civil Procedure; further, that plaintiff-appellant's third cause of action, seeking a declaratory judgment, would not terminate the uncertainty or controversy over the revocation of her business license (Order R. 60). Plaintiff-appellant was then given 10 days by the lower court, to amend her third cause of action in order to file an extraordinary writ, under Rule 65B of the Utah Rules of Civil Procedure which would permit a review of the revocation of her license by the Board of County Commissioners (Order, R. 60).

Plaintiff-appellant elected, instead, to file an appeal to the Utah Supreme Court, rather than to petition for an extraordinary writ.

ARGUMENT

POINT I.

PLAINTIFF-APPELLANT'S APPEAL FROM THE REVOCATION OF HER BUSINESS LICENSE BY THE BOARD OF COUNTY COMMISSIONERS IS LIMITED TO A JUDICIAL REVIEW OF THE RECORD, BY FILING AN EXTRAORDINARY WRIT

The right to appeal, in the absence of a governing constitutional provision, may be granted, or withheld, at the discretion of the legislature, and does not exist unless specifically granted by statute; see Re Grant, 44 Utah 386, 140 P. 226 (1914) -- in this case, the concurring Justices, Straup and Frick, were even of the opinion that where a statute failed to provide for an appeal from the revocation of a liquor license by the lower courts, or boards of trustees, commissioners, and city councils, there is no right of appeal. Consequently, appellant's right of appeal is limited to that provided by the legislature, or by the constitution.

Under the present Rules of Civil Procedure, the only manner provided for reviewing the revocation of a business license by the Board of County Commissioners is defined by Rule 65B, which is comparable to an extraordinary writ.

Rule 65B. Extraordinary Writs

> "(a) Special Forms of Writs Abolished. Special forms of pleadings and of writs in habeas corpus, mandamus, quo warranto, certiorari, prohibition, and other extraordinary writs, as heretofore known, are heretofore abolished. Where no other plain speedy and adequate remedy exists, relief may be obtained by appropriate action under these rules, on any one of the grounds set forth in subdivision (b) and (f) of this rule.
>
> (b) Grounds for Relief. Appropriate relief may be granted:
>
> . . .

(2) Where an inferior tribunal, board of officer exercising judicial functions has exceeded its jurisdiction or abused its discretion; or

(3) Where the relief sought is to compel any inferior tribunal, or any corporation, board or person to perform an act which the law specially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is lawfully excluded by such inferior tribunal or by such corporation, board or person; or

(4) Where the relief sought is to arrest the proceedings of any tribunal, corporation, board or person, whether exercising functions judicial or ministerial, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board of person." (Emphasis added)

Therefore, where minutes of the license revocation hearing were transcribed from tape recordings which captured and preserved the complete record of the hearing (Minutes R. 20), appellant is limited to a judicial re-examination of that record, via a writ of review; see Denver and Rio Grande Western Railroad Co., et al. vs. Central Weber Sewer Improvement District, et al., 4 U. 2d 105, 287 P. 2d 884 (1955).

Even conceding, for the purposes of argument, that the Board of County Commissioners acts as a "tribunal" when it revokes a business license, the plaintiff-appellant would only be entitled to a review of the record by the district court, under the provisions or Article VIII, Section 7 of the Constitution of Utah, which reads:

"The District Court shall have original jurisdiction in all matters civil and criminal not excepted in this Constitution, and not prohibited by law: appellate jurisdiction from all inferior courts and tribunals, and a supervisory control of the same . . ." (emphasis added)

"Appellate jurisdiction is the jurisdiction to review the decision or judgment of an inferior tribunal, upon the record made in that tribunal, and to affirm, reverse or modify such decision; judgment or decree."

See State vs. Johnson, 100 U. 316, 114 P. 2d 1034 (1941)

Consequently, the lower court did not err in dismissing the plaintiff-appellant's complaint which sought a de novo trial concerning the revocation of her license by the Board of County Commissioners.

POINT II

THE LOWER COURT DID NOT ERR IN DENYING PLAINTIFF-APPELLANT'S COMPLAINT WHICH SOUGHT DECLARATORY RELIEF

Under Section 78-33-6, U.C.A., 1953, as amended, the trial court is given wide discretion to refuse to enter a declaratory judgment, where such judgment would not terminate the uncertainty giving rise to the proceeding.

"78-33-6. Discretion to deny declaratory relief.-- The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered, would not terminate the uncertainty or controversy giving rise to the proceeding."

Therefore, where the quasi-judicial revocation of plaintiff-appellant's business license was appealable to the district court via an extraordinary writ of review pursuant to Rule 65B of the Utah Rules of Civil Procedure, the district court did not err in denying her complaint which sought declaratory relief and asked to review the actions of the Board by testing the constitutionality of the ordinances, which were the basis for revoking plaintiff-appellant's business license; see Johnson vs. Yeilding, 267 Ala. 108, 100 So. 2d 29 (1958); and Miami vs. Eldridge (Fla. App.) 126 So. 2d 169 (1956).

Especially, where the Court in its order dated October 22, 1975, allowed plaintiff-appellant 10 days to amend her complaint to petition for an extraordinary writ of review.

Nor was plainiff-appellant entitled to challenge the constitutionality of the ordinances under which she was licensed. It is a well accepted rule of law that a person who obtains a license under a law, and for a time enjoys the benefits thereof, cannot afterward question the constitutionality of the ordinance, when the license is sought to be revoked or suspended. For cases following this rule, see: Thomas J. Molloy & Co. vs. Berkshire, (1944, CA2 NY), 143 F. 2d 218, cert. den 323 U.S. 802, 89 L. Ed. 640, 65 S.Ct. 559, reh. den. 324 U.S. 886, 98 L.Ed. 1436, 65 S.Ct. 711; Eichholz vs. Hargus, (1938, DC Mo.), 23 F. Supp. 587, aff'd in 306 U.S. 268, 83 L.Ed. 641, 59 S.Ct. 532, reh. den. 306 U.S. 669, 83 L.Ed. 1063; Gregory vs. Hecke, 73 Cal. App. 2d 268, 238 P. 787 (1925); Wong vs. Public Utilities Commission, 33 Hawaii 813 (1936), Crittenden County vs. McConnell, 237 Ky 806, 36 S.W. 2d 627 (1931); Appeal of Bornstein, 126 Me. 532, 140 A. 194 (1928); Criscuolo vs. Department of Public Utilities, 302 Mass. 438, 19 N.E. 2d 708 (1939); Morley vs. Wilson, Police Commissioner, 261 Mass. 296, 159 N.E. 41, cert. den. 276 U.S. 625, 72 L. ED. 738, 48 S.Ct. 320 (1927); Williams vs. Mack, 202 Minn. 402, 278 N.W. 585 (1938); State ex rel. Kehr vs. Turner, 210 Mo. 77, 107 S.W. 1064 (1908); Cofman vs. Ousterhous, 40 N.D. 390, 168 N.W. 826, 18 ALR 219 (1918); State ex rel. Bluemound Amusement Park, Inc. vs. Milwaukee, 207 Wis. 199, 240 N.W. 847, 79 ALR 281 (1932); and Schutt vs. Kenosha, 258 Wis. 83, 44 N.W. 2d 902 (1950). For an excellent discussion of this rule and the

above case, see 65 ALR 2d 660.

In conclusion, where the certified record indicates that the plaintiff-appellant had a license to do business in Salt Lake County, and was doing business in Salt Lake County at the time of the license revocation hearing, she is now estopped from challenging the constitutionality of the ordinances under which she was licensed; further, the lower court did not err in dismissing her complaint, seeking declaratory judgment. Indeed, had plaintiff-appellant wanted to challenge the ordinance provisions, she should have first paid her license fees under protest, and then sought declaratory relief; instead, she chose to operate, pursuant to three ordinances and then to bring suit to challenge the same after the County Commission took steps to, and did, properly revoke her license.

CONCLUSION

The lower court did not err in dismissing plaintiff-appellant's complaint seeking a de novo trial to review the revocation of her business license by the Board of County Commissioners of Salt Lake County. Plaintiff-appellant is only entitled to judicial review by the lower court of the record of the proceedings before the Board of County Commissioners, and therefore the dismissal of her complaint should be affirmed.

Nor was the plaintiff-appellant entitled to challenge the constitutionality of the ordinances under which she operated prior to the revocation of her business license. Consequently, when she elected not to file an extraordinary writ pursuant to Rule 65B of the Utah Rules of Civil Procedure to review the actions of the Board of

County Commissioners, she is estopped from challenging the validity of the proceedings and the constitutionality of the ordinance provisions.

Respectfully submitted,

R. PAUL VAN DAM
Salt Lake County Attorney

DONALD SAWAYA
Chief Civil Deputy County Attorney

MARCUS G. THEODORE
Deputy County Attorney

Attorneys for Defendants-Respondents